No. 15114

IN THE

United States Court of Appeals For the Ninth Circuit

CHARLES J. FRIDAY, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the District of Idaho, Southern Division

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

The jurisdiction of the district court was invoked under 28 U.S.C. 1346(b). The memorandum opinion and judgment of the district court (R. 15-18) are not reported. The jurisdiction of this Court rests upon 28 U.S.C. 1291 by reason of a notice of appeal filed March 19, 1956, from a judgment in favor of the United States entered on January 20, 1956 (R. 18).

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), by Charles J. Friday, appellant here, to recover for injuries suffered in a three-car collision. The accident was alleged to have been caused by the negligent operation of a Government vehicle by an employee of the United States. The District Court for the District of Idaho, Southern Division, pursuant to a memorandum opinion (R. 15-17), entered summary judgment for the Government (R. 17-18). The facts, as alleged in the complaint and the proceedings below, may be summarized as follows:

The complaint, filed October 12, 1954 (R. 3-6), states that at approximately 8:00 A.M. on October 30, 1953, appellant was driving his 1951 Kaiser automobile, in a lawful manner, west on U.S. Highway 30 about three and one-half miles west of Boise, Idaho (R. 3). At the same time, one Ralph Lacy was driving a Willys Jeep in an easterly direction on that highway (R. 3). The complaint continues that at that time and place, one Francis E. Fennerty, proceeding behind Lacy's jeep in a Chevrolet panel truck, had negligently fallen asleep at the wheel, and as a consequence his truck was driven into the rear of the vehicle operated by Lacy. Lacy's car, in turn, was propelled across the center line of the highway, causing it to collide with the Friday automobile (R. 3-4, 6). The vehicle being operated by Fennerty was stated to be owned by the United States, and it was alleged that Fennerty was a Government employee, acting at the time within the scope of his employment (R. 4).

Plaintiff went on to state "that the United States, acting by and through its agents and servants, and in particular its agent and servant, S. W. Wells,[1] was negligent, reckless and careless in directing the said Francis E. Fennerty to drive said Government vehicle to a certain Government soil and water testing project near Caldwell, Idaho, the evening of October 29, 1953, and was negligent, reckless and careless in authorizing and directing [Fennerty] to remain on said project and continuously work throughout the night of October 29, 1953, and to thereafter drive said Government vehicle from that point and return to Boise, Idaho, which he was doing at the time of the above-described collision without allowing [Fennerty] to obtain sufficient sleep or rest before his return to Boise, Idaho, and that the fatigued condition of [Fennerty] was a contributing factor to the negligent and careless operation of said United States vehicle prior to and at the time of the collision with the automobile of Plaintiff" (R. 4-5). Wells (West) was stated to be the immediate supervisor of Fennerty in the United States Geological Survey, Ground Water Branch (R. 6). The complaint concluded by alleging consequent property and personal injuries and requested judgment in the amount of $61,386.85 (R. 6).

The Government thereafter answered, denying that the accident was caused by any negligence on the part of Fennerty or his supervisor, and stating that if the supervisor performed the acts alleged, it was in the performance of a discretionary function and without the purview of the Tort Claims Act (R. 7-8). The

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[1] Properly, S. W. West (R. 16).

answer also stated that on December 7, 1953, plaintiff, for a consideration of $5,000, delivered to Fennerty a general written release, which release also effected a discharge of the Government from the liability asserted in the complaint (R. 9-10). A copy of the release (R. 10-12) was attached to the complaint as an exhibit.[2] Subsequently, in answer to the Govern-

[2] The release (R. 10-12) provided as follows:

RELEASE IN FULL

For and in consideration of the sum of Five Thousand ($5,000.00) and other valuable considerations, the receipt of which is hereby acknowledged, the undersigned do hereby release and forever discharge Francis E. Fennerty and Phyllis C. Fennerty, jointly and severally, from any and all claims, demands, damages, expenses, costs, causes of actions and suits growing out of and arising by reason of that certain accident which occurred on or about October 30, 1953, on U.S. Highway 30, at or near 2½ miles west of Boise, Ada County, Idaho, inflicting upon the undersigned serious personal injuries and property damages.

It is understood and agreed that this is a full and final release of all liability of whatever character, kind or nature, growing out of the above captioned accident by reason of personal injuries and property damages sustained by the undersigned as against the said Francis E. Fennerty and Phyllis C. Fennerty.

It is further understood and agreed that payment hereunder is not and shall not be construed as admission of liability by the said Francis E. Fennerty and Phyllis C. Fennerty and that this is a full, complete and final compromise settlement of disputed claims as between the parties hereto.

It is further understood and agreed that this release, as stated herein, shall be a bar to any action or suit against the said Francis E. Fennerty and Phyllis C. Fennerty by the undersigned for any claimed negligence on their part, but this release shall not inure to the benefit of any other tort feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned.

Dated this 7th day of December, 1953, at Seattle, State of Washington.

CHARLES J. FRIDAY
DOROTHY W. FRIDAY

ment's Request for Admissions (R. 12-13), plaintiff admitted that the release produced by the Government was a correct copy of the December 7, 1953, release; that it was for valuable consideration; and that it related to the accident in suit (R. 13).

Thereafter, on May 13, 1955, the Government moved for summary judgment on the basis of the admissions and pleadings (R. 14-15). On January 10, 1956, the district court entered summary judgment for the Government (R. 17). The court stated that under the undisputed facts, the alleged actions of the supervisor, West, were "certainly not a proximate cause of the accident," and in any event, his decision being discretionary, would come within the classification of suits prohibited by the Tort Claims Act (R. 16). The court went on to discuss the effect of the release. It concluded that the release excepted from its terms independent tortfeasors, that the United States, with respect to its employee Fennerty, was, in law, not an independent, but a joint tortfeasor and that, therefore, the release discharged the United States as well (R. 16).

QUESTIONS PRESENTED

1. Whether the effect of the release executed by appellant was to discharge the United States from liability for the alleged negligence of its employee Fennerty.

2. Whether the release executed by appellant effected the discharge from liability of Government employee West.

3. Whether the complaint stated has alleged such negligent or wrongful acts on the part of West as

would constitute a valid cause of action against the Government.

SUMMARY OF ARGUMENT

Appellant seeks to bottom Governmental liability upon dual bases: the alleged negligent acts of Fennerty in his operation of the Government vehicle; and the purported negligence of Fennerty's supervisor, West, in making a night assignment and in conjunction therewith, either authorizing or directing subsequent automotive travel. In both instances, the district court held liability was non-existent as a matter of law. The result, we submit, is a correct one.

With respect to Fennerty, the release executed by appellant constituted a release of the United States as well. Generally, a release of one joint tortfeasor has the effect in law of releasing remaining joint tortfeasors—a category in which the United States, at the most, was placed by virtue of its employment relationship with Fennerty. Although there is a division in the cases as to whether a release given one joint tortfeasor may, by a reservation, save a claimant's rights against other joint tortfeasors, examination of the release in controversy clearly shows that, even according validity to such a reservation, any right of action against the United States was not, in terms, reserved. The reservation contained in that release specifically applies only to a tortfeasor against whom liability may be predicated by reason of "independent negligence * * * acts by, or liability * * * causing or contributing to the damages and injuries suffered" (R. 11). The *respondeat superior*

liability of the United States is manifestly not encompassed within those terms.

Nor does the asserted *respondeat superior* liability of the Government, for the alleged acts of West, rest upon stronger foundations. West's status being that of a joint tortfeasor, the release of another joint tortfeasor would ordinarily release him and his employer as well. Even accepting the approach of those cases which recognize the validity of reservations in a release, the district court's construction of this reservation as applying solely to independent tortfeasors would preclude applicability of the reservation to West. Moreover, apart from the foregoing, the complaint, as to West, fails on other grounds. The allegations of the complaint examined in the context of the controlling cases discloses an absence of the fundamental factors upon which a valid cause of action for negligence must be founded. Both with regard to duty and causation, the complaint, as to West, is essentially defective. The basis, therefore, for the vicarious liability of the Government is absent. The district court mentioned the discretionary function exception of the Tort Claims Act as an alternative basis for precluding liability with respect to West. However, in view of the fundamental bars to recovery outlined above, we see no valid reason for raising the complex issues inhering in that defense.

ARGUMENT

I

The District Court Properly Held That Appellant's Release of Government Employee Fennerty Was an Effective Release of the United States From Liability to Appellant for Fennerty's Alleged Negligence

Appellant's initial claim against the United States arising out of the collision is based upon the purported negligence of Fennerty in his operation of the Government vehicle. Fennerty, it is conceded, was released from liability for valuable consideration. Nevertheless, appellant insists, he is entitled to additional compensation for the same injuries by virtue of the *respondeat superior* liability of Fennerty's employer. It is clear, however, that this release did not merely affect the personal liability of Fennerty, but undercut, as well, the liability of the United States.

At common law, the rule was generally established that release by a claimant of one of several joint tortfeasors constituted an absolute bar to an action against the others.[3] Such a release, many of the cases further held, could not be qualified by a reservation of rights against the remaining tortfeasors—a reservation being considered ineffective and void and the remaining joint tortfeasors discharged notwithstanding.[4] See

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[3] Under Idaho law, the joint tortfeasor relationship is present where there is a "concert of action, common design or duty, joint enterprise, or other relationship." *Husky Ref. Co.* v. *Barnes,* 119 F. 2d 715, 716 (C.A. 9); *Young* v. *Anderson,* 33 Ida. 522, 196 P. 193.

[4] It is the theory of at least some of these courts that in the case of an unliquidated demand, it could not be said that the payment of any sum, however small, in consideration of a release, does not, or cannot, operate as compensation for the injuries. See *Flynn* v. *Manson,* 19 Cal. App. 400, 126 P. 181; *Gilbert* v. *Timms,* 7 Ohio C.C. (NS) 253.

e.g., Aiken v. *Insull,* 122 F.2d 746 (C.A. 7), certiorari denied, 315 U.S. 806; *Goldstein* v. *Gilbert,* 125 W.Va. 250, 23 S.E. 2d 606; *Roper* v. *Florida Pub. Utilities Co.,* 131 Fla. 709, 179 So. 904; *Bland* v. *Warwickshire Corp.,* 160 Va. 131, 168 S.E. 443; *Ducey* v. *Patterson,* 37 Colo. 216, 86 P. 109; *Williams* v. *LeBar,* 141 Pa. 149, 21 Atl. 525; *Stusser* v. *Mutual Union Ins. Co.,* 127 Wash. 449, 453, 221 P. 331; *Moffit* v. *Endtz,* 232 Mich. 2, 204 N.W. 764; *Farmers Sav. Bank* v. *Aldrich,* 153 Iowa 144, 133 N.W. 383.

Certain jurisdictions have departed from the common law rule by recognizing the validity of such reservations and their effect on the liability of persons who come within their terms. This view is exemplified by the position taken by the *Restatement, Torts,* which provides as follows:

> § 885. (1) A valid release of one tortfeasor from liability for a harm, given by the injured person, discharges all others liable for the same harm, unless the parties to the release agree that the release shall not discharge the others and, if the release is embodied in a document, unless such agreement appears in the document.

The Idaho Supreme Court has not had occasion to pass upon this question or to align itself with one line of decisions or the other. The Idaho court, in common with other courts, has taken the position that the release of one independent tortfeasor does not have

the effect of releasing other independent tortfeasors.[5] *Valles* v. *Union Pac. R. Co.,* 72 Ida. 231, 238 P.2d 1154. See also, *Husky Ref. Co.* v. *Barnes,* 119 F.2d 715 (C.A. 9). However, while expressly holding the foregoing in *Valles* as to independent tortfeasors, the Idaho court has just as explicitly declined to commit itself with respect to joint tortfeasors. 72 Ida. 231 at 239.[6]

Irrespective, however, of the silence of the Idaho Supreme Court, it is apparent, in the circumstances of this case, that the same result is reached whether the rule applied is that adhered to at common law or that exemplified by the *Restatement, supra.* Even following the approach which gives effect to reservations, the terms of the reservation in this case clearly do not encompass the United States. The release itself, after stating that "this is a full and final release

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[5] An independent tortfeasor status is created where the independent, tortious acts of two or more persons combine to produce an injury. *Husky Ref. Co.* v. *Barnes,* 119 F. 2d 715, 716 (C.A. 9); *Valles* v. *Union Pac. R. Co.,* 72 Ida. 231.

[6] Appellant, in its brief (p. 20), cites an extract from the *Valles* opinion which states (72 Ida. at 239):

> "Before one joint tort feasor can be held to be discharged from liability through the release of another, a consideration for such release must have been accepted by the plaintiff in full satisfaction of the injury." * * * Wallner v. Barry, 207 Cal. 465, 279 P. 148, 151.

The foregoing, as the *Valles* opinion makes clear, is an extract from a decision of the California Supreme Court in *Wallner* v. *Barry.* The *Valles* opinion immediately appends after this extract the following comment (72 Ida. 231 at 239):

> It is necessary that we hold the above law pertinent only as to independent tort-feasors. We hold neither way herein as to joint tort-feasors.

of all liability of whatever character, kind or nature, growing out of the above captioned accident'' against Fennerty (R. 11), goes on to provide (at R. 11):

> * * * but this release shall not inure to the benefit of any other tort feasor, upon whom and against who a liability may be predicated by reason of independent negligence of, acts by, or liability on the part of said other tort feasor or tort feasors causing or contributing to the damages and injuries suffered by the undersigned.

The district court held this to be a reservation as against independent tortfeasors and stated that as to its employee, Fennerty, the Government was not an independent but a joint tortfeasor.[7] But aside from the foregoing, the plain terms of the reservation do not cover the United States. With respect to Fennerty's negligence, the Government is not being charged with any ''independent negligence, acts by, or liability * * * causing or contributing to the damages and injuries suffered'' by Friday (R. 11).

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[7] This accords with the now generally-established view that where liability on the part of a master is predicated solely on his *respondeat superior* liability for the negligent acts of his servant, and not on any negligent acts of the master himself, the master and servant are treated as joint tortfeasors. See *United States* v. *First Security Bank of Utah,* 208 F. 2d 424, 428 (C.A. 10); *Norwalk* v. *Air-way Electric Appliance Corp.,* 87 F. 2d 317 (C.A. 2); *Johns* v. *Hake,* 15 Wash. 2d 651, 656, 131 P. 2d 933; *Lasko* v. *Meier,* 394 Ill. 71, 76, 67 N.E. 2d 162; 98 A.L.R. 1057. A valid release of either master or servant from liability for the tort operates to release the other. See *e.g., Horgan* v. *Boston Elevated R. Co.,* 208 Mass. 287, 94 N.E. 386; *MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N.W. 572; *Hartigan* v. *Dickson,* 81 Minn. 284, 83 N.W. 1091; *McLaughlin* v. *Siegel,* 166 Va. 374, 185 S.E. 873.

The Government's liability is predicated solely on a *respondeat superior* basis for the alleged negligence of one of its employees.

If it were the intent of the reservation to preserve any claim which appellant might have had against the United States, the language used was not apposite. It is illuminating in this connection to compare the reservation in the present case with the reservation involved in *United States* v. *First Security Bank of Utah,* 208 F.2d 424 (C.A. 10), which case, appellant asserts (Brief, p. 23), does not differ from this case "in any material respect." *First Security* involved four Tort Claims Act suits brought against the United States after the plaintiffs had made settlements with the Government employee allegedly responsible for their injuries. In conjunction with these settlements, each plaintiff executed a covenant not to sue "wherein the right to proceed against the United States under the Tort Claims Act was specifically reserved." 208 F.2d at 428. The issue in *First Security,* insofar as it relates to the case at bar, was whether plaintiffs had saved their rights against the Government. The Tenth Circuit pointed out that when a master is sought to be held liable for the negligence of his servant on a *respondeat superior* basis, a majority of the courts consider them to be joint tortfeasors. 208 F.2d at 428. With respect to the liability of the United States, the court first stated that "It is well established that the release of one joint tortfeasor operates to release all of them" (208 F.2d at 428). It went on to hold, however, that under Utah law, which controlled, a covenant not to sue one or more tortfeasors with an

express reservation of the right to proceed against others does not bar an action against the other tortfeasors. 208 F.2d at 428.

It is apparent that the *First Security* decision is distinguishable from the present case on two fundamental grounds. Initially, as the Tenth Circuit pointed out, Utah has a statute which alters the common law with respect to the release of joint tortfeasors. There is no comparable statute in Idaho. Moreover, the terms of the reservation in the release involved in *First Security* differed markedly from the terms before this Court in the present case. In the former, the right to proceed against the United States to recover damages under the Tort Claims Act was "specifically reserved" whereas in the instant case, the reservation was couched in language (*supra,* p. 11) as could have no applicability to the *respondeat superior* liability of the United States. In fact, it would seem the most likely construction that the intent of the reservation in the present case was to save appellant's rights against any independent tortfeasor, such as Ralph Lacy, whose jeep it was that actually collided with appellant's car (R. 3-4).[8] Clearly, the analogies derived from a comparison with *First Security* favor the position of the Government, not that of appellant.

In short, viewed even from the legal vantage point most favorable to appellant, the reservation in this release did not reserve any right appellant might have

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[8] The *Restatement* has taken the position that where each independent tortfeasor is liable for the entire harm, a release of one independent tortfeasor, without reservation, releases the remaining independent tortfeasors. *Restatement, Torts,* Section 885.

had against the Government arising out of the alleged negligence of its employee, Fennerty. Accordingly, the release of Fennerty precluded Governmental liability for his acts as well.

II

Plaintiff's Complaint Failed to State a Valid Cause of Action Against Government Employee West

Notwithstanding its release for consideration of Government employee Fennerty, appellant seeks to impose liability on the United States arising out of the same accident for the actions of Fennerty's supervisor, S. W. West. The complaint alleges that West was negligent in making a night duty assignment to Fennerty, to be performed near Caldwell, Idaho, about twenty-five miles from Boise, and "authorizing and directing [Fennerty] to remain on said project and continuously work throughout the night of October 23, 1953, and to thereafter drive said Government vehicle from that point and return to Boise, Idaho, which he was doing at the time of the above-described collision without allowing [Fennerty] to obtain sufficient sleep or rest before his return" (R. 4-5). Fennerty's fatigued condition was asserted to be a contributing factor to the allegedly negligent operation of the Government vehicle at the time of the collision (R. 5).

Initially, it is clear that if the common law theory as to the effect of a release is followed (*supra*, pp. 8-9), one of the consequences of appellant's release of Fennerty was the release from liability of West. Moreover, even following the view espoused by the *Restatement* (*supra,* p. 9), which gives effect to a

reservation in such a release, the reservation, which, as construed by the district court, applies only to independent tortfeasors, does not cover West, who would manifestly be a joint tortfeasor. Again, it should be emphasized that the reservation appears to be an effort to preserve appellant's rights against an independent tortfeasor such as Lacy, whose vehicle actually collided with appellant's car.

However, even disregarding the foregoing, appellant's attempt to predicate Governmental liability upon the alleged liability of its employee, West, is fundamentally defective. Appellant, to recover from the United States upon a *respondeat superior* basis for the allegedly negligent acts of West, must, of course, state the elements of a valid cause of action against West under the law of the State of Idaho. 28 U.S.C. 1346(b). Idaho law, in turn, predicates tort liability for negligence upon the standard principles generally applicable—breach of a duty to use due care plus causation. *Chatterton* v. *Pocatello Post,* 70 Ida. 480, 483, 223 P.2d 389. Accepting the factual allegations of the complaint as true, the essential elements of a sustainable cause of action are not set forth.

The primary breach of duty factor is assuredly not present here, as a matter of law. The gist of appellant's grievance with respect to the actions of West is that West assigned Fennerty to perform certain night work at a Government soil and water testing project near Caldwell, Idaho, and authorized and directed him to remain on the project throughout the night and thereafter return to Boise, Idaho, with-

out sufficient rest (R. 4-5). The complaint, it will be noted, contains no allegation that Fennerty had been on duty during the day prior to this night work. Nor is there any allegation that his supervisor knew that Fennerty's condition was such that he was, or would be, unfit to drive the twenty-five miles between Caldwell and Boise. The complaint is even devoid of any allegation that Fennerty was required to return by a certain time. The fundamental question arises then, as to what duty, if any, West owed the general public, or one in appellant's position, in these circumstances.

These factors are pointed up by examination of a recent decision of this Court. *General Electric Co.* v. *Rees, et al.,* 217 F.2d 595 (C.A. 9), involved an action for personal injuries and property damages sustained when a bus owned by defendant company collided with plaintiff's dwelling after the bus driver had suffered a fatal heart attack. The complaint in that case alleged that the driver had previously been examined and treated by company physicians; that the company knew, or should have known, that the driver was in poor health, suffering from a heart condition and hardening of the arteries and was subject to heart attacks; and that, therefore, the company knew, or should have known, that the driver's continued employment in that capacity would be dangerous to the public at large and might result in injuries to persons and property. The district court overruled a motion to dismiss the complaint and the case proceeded to a trial, followed by a jury verdict for the plaintiffs. On appeal, this Court reversed, stating, *inter alia,* that the count of the complaint outlined above "did not

state a cause of action or a claim upon which relief could be granted." 217 F.2d 595, 597. With respect to the duty allegedly encumbent upon the company, the opinion states (217 F.2d at 597):

> Defendant owes no such duty to members of the general public. It is conceivable that an industrial concern might owe a duty to the employee to have a doctor examine him in order that he might not be placed in an extra-hazardous situation on account of disabilities not obvious to an ordinary observer or of which it obtained knowledge in fact. More remotely, fellow employees might rely upon the performance of this obligation. But the driving of the vehicle described certainly would not fall into a classification of extra-hazardous employment either for [the driver] or for the fellow employees who rode as passengers. A motor vehicle is not a dangerous instrumentality.

The Court recognized that "[o]bvious physical defects can be contemplated which might place a duty on the employer even here," but went on to state that if such a cause of action were "otherwise valid, the employer must still have had actual knowledge." 217 F.2d at 598. Relating the foregoing to the case before it, this Court concluded "that it was improper for the court to impose upon defendant toward the public any duty unless defendant positively knew, through its physician or otherwise, that [the driver] might die at any moment and that risk and danger to the public were involved." 217 F.2d at 598.

The reasoning underlying *Rees* finds support in analogous cases in this area. The closest parallel in the

cases to the circumstances of the instant action, with respect to the liability of West, are those decisions dealing with the liability of the owner of a car for the negligence of a third person to whom the car is loaned or hired when that third party suffers from some disability which causes an accident. The basis for liability in such cases is the owner's negligence in entrusting the vehicle to an incompetent person.[9] Although the Idaho courts have not had occasion to pass upon the question of liability predicated on this ground, other jurisdictions which have, have uniformly restricted the owner's liability to cases where the owner "intrusts his automobile to another knowing that the borrower is an incompetent, reckless or careless driver and likely to cause injuries to others in the use of the automobile." *Department of Water and Power* v. *Anderson,* 95 F.2d 577, 582 (C.A. 9), certiorari denied, 305 U.S. 607; cf. *R. J. Reynolds Tobacco Co.* v. *Newby,* 145 F.2d 768 (C.A. 9). See cases collected 36 A.L.R. 1137, 1148-1150; 68 A.L.R. 1008, 1009-1014; 100 A.L.R. 920, 923-926. The factors generating such liability have been confined by those cases to certain generalized categories: where the owner had knowledge of some specific physical or mental impairment of the driver; known repeated instances of the driver's prior negligent or reckless conduct; or, intoxication or known addiction to

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[9] This situation should be differentiated from those cases where the owner's liability is predicated either on a *respondeat superior* basis, or on the basis of a statute which makes him liable for the driver's negligence. With respect to the alleged liability of West, neither of those bases are presented by the instant case.

excessive use of intoxicants. We have been unable to discover any case where the owner's liability has been predicated solely on the possibility that an otherwise competent driver may, at some subsequent time, become fatigued and fall asleep at the wheel.[10] Nor, as indicated *supra,* p. 16, does the complaint in the present case contain allegations necessary to bring it within the ambit of the above doctrine. Cf. *Spurling* v. *Fillingim,* 244 Ala. 172, 12 So. 2d 740, 742; *Graham* v. *Cleveland,* 58 Ga. App. 810, 815-816, 200 S.E. 184; *Davis* v. *Shaw* (La. App.), 142 So. 301, 306-307. The factors underlying duty here, therefore, as in the *Rees* case, are absent.

Appellant fares no better upon consideration of the causation element. The Idaho cases establish that "proximate causes are such as are the ordinary and natural result of the omission or negligence complained of, and are usual and might have been reasonably expected to occur." *Antler* v. *Cox,* 27 Ida. 517, 527, 149 P. 731; *Craig* v. *Village of Meridian,* 56 Ida. 220, 228, 52 P.2d 145. The complaint in the

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[10] *Curtis* v. *Curtis,* 58 Ida. 76, 70 P. 2d 369, cited by appellant in this connection, is not in point. *Curtis* was a suit by a passenger in an automobile against the driver for injuries received when the driver fell asleep at the wheel and the car crashed off the road. At the time of the accident, both the driver and the passenger had apparently fallen asleep. The Idaho court held that the driver could have been found to have been negligent for falling asleep, but that if the plaintiff passenger had seen that the driver was asleep or, by the exercise of ordinary care for her own safety she would have seen that the driver was asleep, it was plaintiff's duty to arouse the driver, and failure to do so would be contributory negligence barring recovery. The alleged negligence of West in the present case bears no analogy to the negligence attributable to either of the parties in *Curtis.*

present case alleges merely that West directed Fennerty to drive to a Government project near Caldwell, "authorizing and directing" him to remain and work throughout the night, and to thereafter return to Boise. Accepting those allegations as true, it would hardly appear that West's assignment of Fennerty qualified under Idaho law as the proximate cause of the collision which ensued. The complaint on its face, and accepting its factual assertions as true, generates the conclusion that the sole proximate cause, in law, of the accident was the alleged negligence of Fennerty at the wheel. That Fennerty's work assignment placed him in a position where use of a car was necessary, is too remote a causative factor upon which to base liability of his supervisor, West. In the absence of knowledge of any countervailing facts, a supervisor is entitled to assume that his subordinates are possessed of a minimum degree of competence and judgment. Cf. *Haverland* v. *Potlatch Lumber Co.,* 34 Ida. 237, 200 P. 129; *R. J. Reynolds Tobacco Co.* v. *Newby,* 145 F.2d 768, 771 (C.A. 9).

Fundamental defects, therefore, underlay appellant's claim against the United States based upon the alleged acts of Government employee West. Recovery was accordingly properly denied by the district court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court be affirmed.

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